SABAH FOREST INDUSTRIES SDN BHD

v.

INDUSTRIAL COURT MALAYSIA & ANOR

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF PCA
ZAHARAH IBRAHIM JCA
DAVID WONG DAK WAH JCA
[CIVIL APPEAL NO: S-01(1M)-359-10-2013]
17 JUNE 2014

LABOUR LAW: *Industrial Court - Unfair dismissal - Award - Compensation in lieu of reinstatement - Second respondent had passed compulsory retirement age when award handed down - Whether there was legal basis for second respondent to be awarded compensation in lieu of reinstatement - Whether Industrial Court fell into error in awarding compensation - Whether award should be quashed - Industrial Relations Act 1967, ss. 20(1), (3), 30(5)*

This was an appeal by Sabah Forest Industries Sdn Bhd ('the appellant') against part of the decision of the High Court that upheld the Industrial Court's award of compensation *in lieu* of reinstatement in the sum of RM159,940 to the second respondent. Briefly, as a result of being dismissed from the services of the appellant, the second respondent filed a representation to the Minister under s. 20(1) of the Industrial Relations Act 1967 ('IRA') for reinstatement of his position. The Minister referred the appellant's representation to the Industrial Court for an award. The chairman of the Industrial Court found that the second respondent was dismissed without just cause or excuse and handed down the said award. There was no dispute that when the award was handed down, the second respondent had passed the retirement age. The appellant's complaint was that there was no legal basis for the Industrial Court award, which was upheld by the High Court, to award compensation *in lieu* of reinstatement to the second respondent as the issue of reinstatement did not arise, as the second respondent had already attained the age of retirement. The issue that called for determination in this appeal was whether in law the award of compensation *in lieu* of reinstatement to the second respondent, whose dismissal was held to be without just cause or excuse, could be made when as at the date of the award, the second respondent had already reached or passed his compulsory retirement age.

Held (allowing appeal with costs)
Per Raus Sharif PCA delivering the judgment of the court:

(1) In awarding compensation to an employee who is found to be dismissed without just cause, the Industrial Court must act according to equity, good conscience and substantial merit of the case as required under s. 30(5) of the IRA. But there must be a legal basis for the Industrial Court to award such compensation. (para 11)

(2) There was no legal basis for the second respondent to be awarded compensation *in lieu* of reinstatement. The award of compensation *in lieu* of reinstatement assumed that the second respondent who had been dismissed had to be reinstated in his employment as at the date of the award. Obviously, the second respondent could not be reinstated or in a position to be reinstated when he was already as at the date of the award reached or passed the retirement age. Thus, the issue of paying the second respondent that compensation *in lieu* of reinstatement did not arise (*Hj Md Ison Baba v. Swedish Motor Assemblies Sdn Bhd*, foll). The Industrial Court fell into error when it awarded the said compensation. Thus, there was an error on the face of the record and the award should be quashed. (para 12)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh Sabah Forest Industries ('perayu') terhadap sebahagian keputusan Mahkamah Tinggi yang telah mengesahkan award Mahkamah Perusahaan yang memberikan pampasan sebagai ganti rugi pengambilan semula dalam jumlah RM159,940 kepada responden kedua. Secara ringkas, akibat dibuang kerja oleh perayu, responden kedua memfailkan representasi kepada Menteri berkenaan di bawah s. 20(1) Akta Perhubungan Perusahaan 1967 ('APP') untuk pengembalian semula jawatannya. Menteri telah merujuk representasi perayu kepada Mahkamah Perusahaan untuk satu award. Pengerusi Mahkamah Perusahaan mendapati bahawa responden kedua telah dibuang kerja tanpa alasan yang bersebab atau adil dan memberikan award tersebut. Tiada pertikaian bahawa apabila award diberikan, responden kedua telah mencapai umur persaraan. Perayu berhujah bahawa tiada asas undang-undang untuk award Mahkamah Perusahaan, yang telah disahkan oleh Mahkamah Tinggi, untuk memberikan pampasan sebagai ganti rugi

pengambilan semula kepada responden kedua kerana isu pengambilan semula tidak timbul, disebabkan responden kedua telah mencapai umur persaraan. Isu yang perlu diputuskan dalam rayuan ini adalah sama ada dari segi undang-undang award pampasan sebagai ganti rugi pengambilan semula kepada responden kedua, yang pembuangan kerjanya adalah tidak bersebab dan tidak adil, boleh dibuat apabila pada tarikh award diberikan, responden kedua telah mencapai dan melepasi umur persaraan wajib.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Dalam mengawardkan pampasan kepada pekerja yang telah dibuang kerja tanpa alasan bersebab dan adil, Mahkamah Perusahaan harus bertindak mengikut ekuiti, perasaan hati yang betul dan merit kes yang cukup seperti yang diperlukan di bawah s. 30(5) APP. Tetapi perlu ada asas undang-undang untuk Mahkamah Perusahaan mengawardkan pampasan itu.

(2) Tiada asas undang-undang untuk responden kedua diberikan award pampasan sebagai ganti rugi pengambilan semula. Award pampasan sebagai ganti rugi pengambilan semula mengandaikan bahawa responden kedua yang telah dipecat harus diambil semula dalam pekerjaannya pada tarikh award itu. Dengan jelasnya, responden kedua tidak boleh diambil semula atau berada dalam kedudukan boleh diambil semula apabila dia sudah mencapai atau melepasi umur persaraan pada tarikh award itu. Oleh itu, isu membayar pampasan kepada responden kedua sebagai ganti rugi pengambilan semula tidak timbul. (*Hj Md Ison Baba v. Swedish Motor Assemblies Sdn Bhd*, diikuti). Mahkamah Perusahaan telah terkhilaf apabila mengawardkan pampasan itu. Oleh itu, terdapat kesalahan yang ketara dan award tersebut harus dibatalkan.

Case(s) referred to:
Dr Dutt v. Assunta Hospital [1981] 1 LNS 5 FC ***(refd)***
Hj Md Ison Baba v. Swedish Motor Assemblies Sdn Bhd [2001] 8 CLJ 180 HC ***(foll)***
Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor [1979] 1 LNS 32 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 20(1), (3), 30(5)

A *For the appellant - S Vanugopal; M/s S Vanugopal & Partners*
For the 2nd respondent - Yunof Maringking; M/s Maringking & Co

[Appeal from High Court, Kota Kinabalu; Judicial Review No: No. K24-01-2010-1]

B *Reported by Suhainah Wahiduddin*

JUDGMENT

C **Raus Sharif PCA:**

Introduction

[1] This is an appeal by Sabah Forest Industries Sdn Bhd (appellant) against part of the decision of the High Court that upheld the Industrial Court's Award of compensation *in lieu* of reinstatement in the sum of RM159,940 to Richard Felin Jinivon (second respondent).

D

[2] We heard the appeal on 24 April 2014. After hearing the parties, we adjourned the matter of our consideration and decision. We now give our decision and the reasons for the same.

E

Relevant Facts

[3] On 2 March 2006, the second respondent was dismissed from the services of the appellant. As a result, the second respondent filed a representation to the Minister under s. 20(1) of the Industrial Relations Act 1967 (IRA) for reinstatement of his position.

F

G **[4]** The Minister referred the appellant's representation to the Industrial Court for an award. On 11 December 2009, the Chairman of the Industrial Court, after a trial, found that the second respondent was dismissed without just cause or excuse and handed an award under the following heads:

H

(i) Backwages from date of dismissal (2 March 2006) to last date of hearing (9 October 2008) but limited to 24 months:

RM7,270 x 24	=	RM174,480
Less 10% for contributory factor on part of appellant		RM 17,448
		RM 157,032

I

(ii) Compensation of one month's salary for each completed year of service (1 August 1984 till 2 March 2006):

	RM159,940
Total	RM316,972

[5] There is no dispute that the trial started on 9 October 2008 and the award was handed down on 11 December 2009. When the trial started, the second respondent was 54 years and ten months old. Thus, when the award was handed down, he had passed the retirement age. And it is not in dispute either that under the appellant's general terms and conditions of service the retirement age for male employees is upon reaching 55 years of age.

Issue

[6] The only issue that called for determination in this appeal is whether in law the award of compensation *in lieu* of reinstatement to the second respondent, whose dismissal was held to be without just cause or excuse, can be made when as at the date of the award the second respondent had already reached or passed his compulsory retirement age.

Findings

[7] This case concerns the representation made by the appellant under sub-ss. 20(1) and (3) of the IRA. The subsections read:

> **20. Representation on dismissal**
>
> (1) Where a workman, irrespective of whether he is a member of a trade union or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
>
> ...
>
> (3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.

[8] It is clear from the above that the primary remedy under s. 20 for the IRA complaint is reinstatement. However, when reinstatement is not a suitable remedy a successful claimant can be awarded monetary compensation. (See Federal Court case of *Dr Dutt v. Assunta Hospital* [1981] 1 LNS 5; [1981] 1 MLJ 304). It is a well established principle that when a claimant is awarded monetary compensation, the award is made under two heads:

(i) Back wages not exceeding 24 months based on the last-drawn salary from the date of dismissal, less deduction for post-dismissal earnings and contributory misconduct; and

(ii) Compensation *in lieu* of reinstatement based on the multiplicand of one month's salary for every completed year of service.

[9] As stated earlier, the only complaint by the appellant in this present appeal is that there is no legal basis for the Industrial Court award, which was upheld by the High Court, compensation *in lieu* of reinstatement to the second respondent as the issue of reinstatement does not arise. This is because at the time of the award the second respondent had already attained the age of retirement. In support learned counsel for the appellant referred to us the decision of the High Court in *Hj Md Ison Baba v. Swedish Motor Assemblies Sdn Bhd* [2001] 8 CLJ 180 where KC Vohrah J (as he then was) held as follows:

> It will be noted that the Industrial Court not only awarded a sum equivalent to ten months' salary as back-wages but also 18 month's salary (one month for every for every year of completed service) as compensation *in lieu* of re-instatement. Swedish Motor has pointed out that the compensation *in lieu* of re-instatement does not arise at the time the Industrial Court computed the compensation payable to Md Ison as he had already reached his retirement age and could not been re-instated beyond his retirement age. From the evidence it seems clear that if Md Ison had not been dismissed but had been allowed to retire he would have only received ten month's salary plus a gratuity of RM82,091.37 from the Group Pension Scheme.
>
> While I cannot see any merit in the 1st ground that the Industrial Court erred in law when it held that Md Ison was only required to be paid a sum equivalent to 10 month's salary as back-wages using 55 years as the age of retirement it appears to me that the Industrial Court was wrong in awarding the equivalent of 18 month's salary as compensation *in lieu* of re-instatement when the Court was not entitled to do so.

[10] Learned counsel for the second respondent however approached this appeal on the basis that this court should be slow in disturbing the award of the Industrial Court, especially so in this case when the award was upheld by the High Court. It was submitted that the amount of the award is very much at the discretion of the Industrial Court to fix under s. 30(5) of the IRA which provides that court should act according "to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form". And it was submitted that the Industrial Court had acted on the right principle when awarding the second respondent compensation *in lieu* of reinstatement, in addition to the backwages, as result of the dismissal.

[11] We accept the principle that in awarding compensation to an employee who is found to be dismissed without just cause, the Industrial Court must act according to equity, good conscience and substantial merit of the case as required under s. 30(5) of the IRA. But there must be a legal basis for the Industrial Court to award such compensation. The Federal Court in *Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1979] 1 LNS 32; [1980] 1 MLJ 109 speaking through Salleh Abas FJ (as he then was) at pp. 112-113 said:

> If there is a legal basis for paying compensation, the question of amount of course is very much a matter of the discretion which the Industrial Court is fully empowered under s. 30 of the Industrial Relation Act to fix, but where there is no legal basis for the payment of compensation, I do not think that the President can create legal right and obligation for it and, in my view, the award will be clearly an error in law for which I am prepared to allow this application.

[12] Applying the above principle to the facts of the instant case, we are of the view that there is no legal basis for the second respondent to be awarded compensation *in lieu* of reinstatement. The award of compensation *in lieu* of reinstatement assumes that the second respondent who had been dismissed has to be reinstated in his employment as at the date of the award. Obviously, the second respondent could not be reinstated or in a position to be reinstated when he was already as at the date of the award reached or passed the retirement age. Thus, the issue of paying the second respondent that compensation *in lieu* of reinstatement does not arise. Such compensation can only be ordered if at the date of the award he had not reached his age of

retirement. But as stated earlier, the second respondent had well passed his retirement age. Thus, we adopt the view expressed by KC Vohrah J (as he then was) in the case of *Haji Md Ison Baba v. Swedish Motor Assemblies Sdn Bhd (supra)* wherein His Lordship held that compensation *in lieu* of re-instatement does not arise in cases where the employee has reached his retirement age.

[13] Thus, it is our finding that the Industrial Court in the instant case fell into error when it awarded compensation *in lieu* of reinstatement when clearly the second respondent cannot be reinstated beyond his retirement age. The Industrial Court had no legal basis to award the second respondent compensation *in lieu* of reinstatement. Thus, there was an error on the face of the record and the award should be quashed.

[14] We therefore allow the appellant's appeal with costs. The award of the Industrial Court which was affirmed by the High Court, in respect of compensation *in lieu* of reinstatement is therefore set aside.